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In the Supreme Court of the United States

Number 6, Original

October Term, 1944

The State of Nebraska, complainant

vs.

The State of Wyoming, defendant,

and

The State of Colorado, impleaded defendant,

The United States of America, intervenor.

EXCEPTIONS OF THE UNITED STATES, INTERVENOR, TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

The United States of America, intervenor, excepts and objects to the report, the conclusions and the recommendations of the Special Master in the particulars hereinafter set out. First, however, it calls attention to the fact that the report does not contain specific findings of fact or conclusions of law and that it does not contain a recommended form of decree. Because of this situation there is some uncertainty as to the portions of the report which are properly subject to exceptions and as to the proper order

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of exceptions. The United States will, in these exceptions, address itself to the "Summary of Conclusions" on pages 6 to 11 of the report in the order in which those summaries are presented, to the "Recommendations for Decree" on pages 177 to 180 of the report in the order in which those recommendations appear and, thereafter, to several factual matters presented elsewhere in the report which seem of importance to the conclusions or recommendations but are not specifically incorporated therein.

I.

The United States excepts and objects to the conclusion of the Special Master contained in paragraph 5 on page 9 of the report that "the claim of Nebraska" to be recognized by the Court includes that asserted

> on account of lands supplied by the so-called North Platte Project Canals whose headgates are located at Whalen, Wyoming.

As grounds for this exception and objection, the United States says that those canals are the property of the United States and that the claim to water for irrigation of the lands served by them is a claim to be recognized in the United States and not in the State of Nebraska, as more fully appears in connection with exception number V *infra*.

II.

The United States excepts and objects to the conclusion contained in paragraph 7, at pages 9 and 10 of the Special Master's report, in that it does not find or conclude that equity requires any restraint on the uses of water on tributary streams entering the North Platte River between Pathfinder Reservoir and Guernsey. This omission is, in turn, based on the conclusions stated at pages 52 and 145–146 of the report that use of tributary water in this area is not of such a present or threatened future nature as to justify regulation, to which conclusions the United States also excepts and objects.

As grounds for and in explanation of this exception and objection, the United States says:

(a) That it concurs in the conclusions reached by the Special Master in so far as they relate to direct flow diversions for irrigation, but that it does not concur and does except to the conclusions in so far as they relate to future storage developments.

(b) That the further construction or greater utilization of storage works on these tributaries in the future would materially injure the enjoyment of the rights of water users in the Whalen to Tri-State Dam section of the river.

(c) And that there are the same justification and need for restriction on future storage of water in reservoirs on these tributaries as appear for

such restriction in areas above Pathfinder Reservoir as is contemplated by conclusions 6 and 7 on page 9 and recommendations 1 and 2 on page 177.

III.

The United States excepts and objects to the conclusions expressed in paragraph 9 of the Special Master's conclusions, at page 10 of the report, that allocation in the river section between Whalen and the Tri-State Dam be

> "between Wyoming and Nebraska on the basis of certain proportions of the daily natural flow."

This conclusion is based on the related conclusions expressed at pages 115 and 148–162 of the report to which exception and objection are also taken.

As grounds for this exception and objection, the United States says:

(a) That the flat percentage basis of allocation of natural flow does not give any weight to priorities, contrary to the Special Master's conclusions in paragraph 4 on page 9 and at pages 112–113, and, in failing to do so, produces an inequitable rather than an equitable conclusion when applied to the facts as developed in the report at pages 148–162.

(b) That, since most of the irrigated acreage in this section has, by contract, a right to participate in storage water from government reser-

voirs (see pages 73–75 of the report), those reservoirs would be compelled, without compensation in other water, to supply a large portion of the deficiencies which would exist for one canal or another at all times under the flat percentage allocation.

(c) That apportionment of natural flow in this river section can be accomplished legally and can only be accomplished equitably by distribution of water pursuant to a priority schedule.

(d) And that any apportionment in this area cannot be solely between Wyoming and Nebraska but must also include the United States as to the allocation of water for use on the lands included within its North Platte Project and served by its project canals, the Interstate, the Ft. Laramie and the Northport.

IV.

The United States excepts and objects to the omission from paragraph 9 of the Special Master's conclusions, at page 10 of the report, of a definition of the term "storage water".

As grounds for this exception and objection, the United States says:

(a) That the term "storage water" is not defined here or elsewhere in the report.

(b) That a definition of that term is essential to the understanding and operation of the conclusion here stated and to the "Recommendation for Decree" at pages 177–180.

(c) That, without such a definition, there will be uncertainty and confusion in the administration of any decree rendered.

(d) That, for purposes of this case and proper effectuation of the apportionment contemplated, "storage water" should be defined to be any water which is released from government reservoirs for use on the lands under storage-contract canals in addition to the water which is discharged through those reservoirs to meet the natural flow requirements of any canal as recognized or prescribed in the decree.

(e) And that, without the definition suggested, the holders of storage water contracts will be denied full enjoyment of the intended, proper and legal benefit of those contracts.

V.

The United States excepts and objects to conclusion number 11 (erroneously numbered 10) on page 11 of the report wherein the Special Master concludes that,

> The position of the United States (or the Secretary of the Interior as representative of the United States) is that of an appropriator of water for storage under the laws of Wyoming. Its interests in that connection are represented by the state of Wyoming. No separate allocation to it would be proper in any scheme of apportionment. Unquestioned however

is its ownership and authority in the operation of the storage and power plants, works, and facilities pertaining to its Reclamation Projects. What interest it may have in any unappropriated water is an academic question not involved in a decision of the suit.

In this exception the United States also includes the similar conclusions reached and stated in the general discussion of this subject at pages 165–177 of the report.

As grounds for this exception and objection, as to all except the fourth sentence of conclusion number 11, the United States says:

(a) That the interest of the United States in unappropriated water is not an academic question in this case, but is instead the pivotal point or basis of determining what rights in *project* water the United States reserved or acquired at the time of construction of its reclamation projects and has maintained thereafter and now.

(b) That the interests of the United States cannot be represented by a state in a proceeding such as this.

(c) That the United States is the owner of proprietary rights in the waters of its reclamation projects and, as such, is entitled to a separate allocation of water in this decree.

(d) That the Special Master's conclusion to the contrary is inconsistent with his conclusion on page 175 that "there has been no subsequent

general grant or divestment of the rights of the United States in the unappropriated water by or under any congressional act, and it would seem that such rights must continue to exist", the water of the reclamation projects having been unappropriated water at the time of the initiation of those projects.

(e) That, even if the United States be deemed to be only an appropriator of the water for its projects, its right to an apportionment in this case exists since the appropriative right is a property right vested in the United States.

(f) That the United States, if not owner of unappropriated water and therefore possessor of an unbroken chain of title to project water, is at least an appropriator of such water.

(g) That the Special Master's conclusion that the United States is an appropriator of water for storage (pages 11 and 141) is inconsistent with his conclusions that the United States is not entitled to a separate allocation of water and that Wyoming represents the interests of the United States.

(h) That the Special Master's conclusion that the United States is an appropriator of water for storage is inconsistent with his conclusion that it is not the appropriator of natural flow water for project uses.

(i) That, by reason of the nature of the contracts between the United States and project

water users as well as Warren Act contract holders, the control and distribution of storage water is dependent on the distribution of natural flow, as a result of which any allocation of all natural flow to the states gives them indirect control over storage water releases with resultant effect both on the ability of the United States to perform its contracts, the propriety or legality of which are nowhere questioned in this report, and on the over-all allocation of the benefits of the water supply which is recommended, particularly disturbing the equitable balance which is so carefully worked out in the report between the benefits accruing to the Whalen to Tri-State Dam section and those accruing to other sections of the river as well as the equitable balance between rights in the Whalen to Tri-State Dam section itself.

(j) That allocation to the United States is necessary to avoid anomalous and inequitable discrepancies between project water users on either side of the state-line.

(k) And that, the conclusions of the Special Master in this regard are inconsistent with legal authority including decisions of this Court.

As grounds for this exception and objection, in so far as it relates to the fourth sentence of conclusion number 11, the United States says:

(l) That the sentence is ambiguous in not making clear whether the United States is recognized

as having ownership and authority over storage water or storage works, or both.

(m) And that the United States is, at the very least, the owner of water stored in its reservoirs, even if it only be an appropriator for storage as stated at the outset of this conclusion number 11, and should be so recognized for purposes of administration of the decree to be entered.

VI.

The United States excepts and objects to the omission from paragraphs 1 and 2 of the Special Master's Recommendations for Decree, on page 177 of his report, of any provision requiring Wyoming and Colorado to maintain complete, accurate and available records of irrigation and storage of water in the areas involved.

As grounds for this exception and objection, the United States says:

(a) That there are no adequate data in or out of the record of this case to determine in many instances what land is in fact irrigated and what reservoirs are in fact storing water.

(b) And that, without complete, accurate and available records of such matters it will be utterly impossible from a practical standpoint for the Court or the other parties to the decree ever to determine whether the limitations fixed in recommendations 1 and 2 are being enforced, or, for that matter, for the states of Colorado or Wyoming

themselves to know whether or not they are meeting the requirements of the decree.

VII.

The United States excepts and objects to the omission from paragraph 2 of the recommendations, at page 177 of the report, of any limitation on future storage of water on tributaries entering the river between Pathfinder Reservoir and Whalen.

As grounds for this exception and objection, the United States respectfully refers the Court to those stated for exception II, *supra*.

VIII.

The United States excepts and objects to that portion of paragraph 2 of the recommendations, on page 177 of the report, which limits storage in reservoirs "above Pathfinder Reservoir" to 18,000 acre feet of water per water year, unless there be added an exemption from that limitation in favor of the Seminoe Reservoir.

As grounds for this exception and objection, the United States says:

(a) That Seminoe Reservoir is the main source of water supply for the Kendrick Project and lies above Pathfinder Reservoir.

(b) That the application of paragraph 2 of the recommendations to Seminoe Reservoir appears to be inadvertent in view of the last sentence of

the conclusion in paragraph 9, page 10 of the report, as well as the conclusions reached regarding that reservoir and the Kendrick Project at pages 137–143 of the report and in view of the specific provisions for them in recommendations 3 and 4 on pages 177 and 178 of the report.

(c) And that the limitation of paragraph 2 of the recommendations as written would be unobjectionable in this regard if the allocation for the Seminoe Reservoir and Kendrick Project were recognized in the United States, as the United States contends it should be.

IX.

The United States excepts and objects to the omission from recommendation 3(a), at pages 177–178 of the report, of provision that, for purposes of the operation of the reservoirs and the Kendrick Project, Nebraska's equitable share of natural flow water is limited to that which is in fact being diverted by any or all the canals listed in paragraph 3-(b) within the limitations in second-feet and acre-feet there fixed.

As grounds for this exception and objection, the United States says:

(a) In view of the wording of that portion of recommendation 6 (page 179) which recognizes Nebraska's right to curtail deliveries to canals under her supervision and in view of the legal

conclusions reached by the Special Master at pages 159–161 of his report, with which conclusions the United States disagrees, a limitation of the type incorporated in this exception is necessary to prevent Nebraska from restricting deliveries to canals at or above the Tri-State dam for the benefit of canals below that dam.

(b) That such action by Nebraska would place a burden on the government reservoirs and the Kendrick Project to supply substitute storage water to the canals above the Tri-State Dam having storage contract rights, as most of them do.

(c) That such action by Nebraska would indirectly make the government reservoirs and the Kendrick Project responsible for supplying water to users diverting below the Tri-State Dam who are not entitled in law or equity thereto.

(d) That omission of the limitation suggested in this exception would disrupt the protection sought to be given by the Special Master against demands arising below Tri-State and would be contrary to the equities determined and declared in paragraph 5 of the "Summary of Conclusions", page 9 of the report.

X.

The United States excepts and objects to the recognition of Wyoming as the party responsible for the storing of water in and operation of Pathfinder, Guernsey, Seminoe and Alcova reservoirs and for diversions for the Kendrick Project in recommendations 3 and 4 at pages 177 and 178 of the report.

For grounds for this exception and objection, the United States respectfully refers the Court to the grounds stated for exception number V, *supra*.

XI.

The United States excepts and objects to the omission from recommendation number 4, at page 178 of the report, of a provision permitting joint operation of the government reservoirs, without reference to priorities among themselves or among the lands which they serve, in the event of adjustment of the storage contracts in such a manner as to remove the objection to joint operation which arises from those contracts as they now stand.

As explanation and grounds for this exception and objection, the United States says:

(a) That the omission flows from the conclusion reached and expressed by the Special Master near the top of page 145 of his report, to which the United States also takes exception.

(b) That the mere leaving of the door open for joint operation, when and if the parties to the storage contracts might agree to a modification of them in that regard, would have no adverse effect in this decree and would permit a more desirable method of storage operations.

(c) And that joint operation of the reservoirs could be conducted under such a system of ac-

counting for water as not to interfere with Wyoming's natural flow appropriations.

XII.

The United States excepts and objects to paragraph 5 of the recommendations, on pages 178–179 of the report, in which the Special Master recommends a provision,

> Restraining Wyoming from the recapture of return flow water of the Kendrick Project after it shall have reached the North Platte River and become commingled with the general flow thereof and from diverting water from the River at or above Alcova Reservoir as in lieu of Kendrick return flow water reaching the river below Alcova.

As grounds for this exception and objection, the United States says:

(a) That, as to the first clause of the recommended restriction, there is no reason why Wyoming lands should be precluded from use of return flows in the North Platte River when Nebraska lands are not so precluded and that there is no reason why any lands served by diversions above the Tri-State Dam should not be accorded the same uses of Kendrick Project return flows that the Special Master recognizes and accords to lands served from below Tri-State Dam as to return flows from the North Platte Project.

(b) That, in accordance with and as required by the Special Master's discussion and conclusions at pages 185–188 of his report, it should merely be provided, in lieu of the first clause of the recommended restriction, that return flows are, for purposes of this decree, deemed to be natural flows when once they have returned to the North Platte River without a declared and exercised intention on the part of the United States to recapture and reuse them.

(c) That, as to the second and final clause of the recommended restriction, there should be a specific recognition of the right of the United States to divert water from the river "at or above Alcova Reservoir as in lieu of" that portion of the Kendrick return flow water which, without the construction of artificial drains by the United States, would collect in so-called "sumps" and never return to the river at all;

(d) That the amount of return flow from artificial drainage of sumps can be easily measured and determined with certainty.

(e) And that recognition of this right is in conformity with the Special Master's conclusions on page 188 (1) that return flows should be held to be abandoned after being permitted "by process of natural drainage" to reach the river and (2) that there is no authority recognizing a right to divert natural flow in lieu of return flow "allowed by natural drainage" to reach the river, he no-

where having concluded that the right should be denied where the drainage is in all respects artificial or "developed" as is the case where the pumps exist.

XIII.

The United States excepts and objects to the apportionment of natural flow water in the Whalen to Tri-State Dam section as set out in recommendation 6, on page 179 of the report, in that it fails to make any apportionment to the United States and specifically recognizes the deliveries to lands under the Interstate and Ft. Laramie canals as being subject to control by Nebraska.

For grounds for this exception and objection, the United States respectfully refers the Court to the grounds stated for exception number V, *supra*.

XIV.

The United States excepts and objects to the adoption of a percentage of flow basis for apportionment of natural flow water in the Whalen to Tri-State Dam section as incorporated in recommendation 6, on page 179 of the report, and to the omission of recommendation for apportionment in that section in accordance with a priority schedule.

For grounds for this exception and objection, the United States respectfully refers the Court to the grounds stated for exception number III, *supra*.

XV.

The United States excepts and objects to the omission in the recommendations for a decree, at pages 177–180 of the report, of a definition of the term "storage water".

For grounds for this exception and objection and for the appropriate definition for use, the United States respectfully refers the Court to the grounds stated for exception number IV, *supra*.

XVI.

The United States excepts and objects to the omission in the recommendations for a decree, at pages 177–180 of the report, of a specific provision that the distribution of storage water is outside the issues of this case and that, in all respects, the limitations and apportionments of the proposed decree relate only to natural flow water.

As grounds for this exception and objection, the United States says:

(a) That without such a provision uncertainty and future conflict may arise as to the effect of this litigation on actual administration of the waters of the stream.

(b) And that the provisions suggested is in accordance with the conclusions of the Special Master in paragraph 9 on page 10 of the report and in the first paragraph on page 69.

XVII.

The United States excepts and objects to omission from the recommendations for a decree, at pages 177–180 of the report, of a provision that the United States is the owner of the water stored in its reservoirs.

As explanation and grounds for this exception, the United States respectfully refers the Court to grounds (l) and (m) stated for exception number V, *supra*.

XVIII.

The United States excepts and objects to the omission in the recommendations for a decree, at pages 177–180 of the report, of a provision excluding from the operation of the decree any water, and the return flows from such water, which in the future may be imported into the North Platte or Platte River basins from foreign water-sheds.

As grounds for this exception and objection, the United States says:

(a) That any water imported from foreign water-sheds for specific purposes does not form a part of the natural water supply of this basin and is not water in which any persons other than those who accomplish its importation have legal or equitable rights.

(b) And that such a provision should be included in the decree so that the decree itself will

not act as a deterrent to future development based on such outside sources of supply.

XIX.

The United States excepts and objects to the omission in the recommendations for decree, at pages 177–180 of the report, of a specific prohibition against the use of storage water by those not entitled thereto by contract.

As grounds for this exception and objection, the United States says:

(a) That such a prohibition might be assumed to follow from the segregation of natural flow and storage water and from the Master's recognition that contracts control the disposition of storage water.

(b) And that the decree should contain such a provision specifically in aid of the orderly and harmonious administration of the water of the stream hereafter.

XX.

The United States excepts and objects to the conclusion of the Special Master stated in the last paragraph on page 180 of his report that portions of his specific recommendations for a decree might be adopted even though others were rejected by the Court.

As grounds for this exception and objection, the United States says:

(a) That the primary purpose to be served by decree in this litigation is to ascertain and pro-

tect the equitable interests of the parties in the flow of the stream.

(b) That those equitable interests can be determined only in relation to each other and can be protected also only in relation to each other.

(c) That elimination of the determination or protection of interests in any section of the stream would throw out of balance the equitable interests of the parties.

(d) And that, although specific recommendations of the Special Master might be altered, all sections of the stream must be taken into consideration in determining and establishing the rights of the parties, their equitable interests and the protection to be afforded to them.

As to specific findings or conclusions contained in the report as basis for ultimate recommendations, but not incorporated directly in the "Summary of Conclusions" or the "Recommendations for Decree", the United States offers the following exceptions:

XXI.

The United States excepts and objects to the omission, on page 15 of the report, of a conclusion that in Wyoming the statutory limitation of 1 second foot of flow for each 70 acres of land irrigated is not applicable as a limitation on storage water.

As grounds for this exception and objection, the United States says that the omitted conclusion is one of importance to the over-all use and distribution of water in this stream and is identical with the conclusion stated by the Special Master also on page 15 in relation to the Nebraska statutory law.

XXII.

The United States excepts and objects to table III, on page 67 of the report.

As grounds for this exception and objection the United States says:

(a) That the seasonal excesses shown in the last column of the table in fact include water actually not usable for irrigation, the correction necessary in this regard being of such magnitude as to alter the average excess shown for the ten-year period to an average deficiency.

(b) And that the table is misleading in that seasonal excesses shown for specific years would, in part, be preserved for use in seasons of deficiency, thereby reducing the deficiencies, if the reservoirs were operated with demands limited to 1,027,000 acre feet in the Whalen to Tri-State Dam section as assumed in the table.

XXIII.

The United States excepts and objects to the Special Master's finding, on page 80 of his report, that the percentages shown in column 2 of the table on page 81 "are probably the truest index of the adequacy of the supply."

As grounds for this exception and objection the United States says:

(a) That the excess water included in the percentages of column 1 of the table but excluded from the percentages of column 2 was often taken at the expense of canals suffering a deficiency, the over-all percentages of column 1, then, appearing as the truest index to the adequacy of supply since the Special Master has found elsewhere in his report (see page 68) that there was no over-supply in this section of the river historically.

(b) And that the non-irrigation season deliveries, which are reflected in the percentages of column 3 of the table, are also deserving of consideration since such diversions aid ground water conditions and tend to reduce needs during the irrigation season.

XXIV.

The United States excepts and objects to the conclusion that the Northport Canal is entitled only to 65 second feet of natural flow water, as shown in the table appearing on page 87 of the report.

As grounds for this exception and objection, the United States says:

(a) That as indicated by footnote 3, on page 87 of the report, the 65 second foot value for Northport is arrived at by excluding the acreage under the Northport Canal which is designed to

be supplied in the future by interception of return flow waters.

(b) That in the early portion of the irrigation season there is very little return flow water available for interception or use by the lands under the Northport Canal and that, therefore, that canal must be allowed the number of second feet of natural flow necessary to serve the entire acreage of that canal during such periods of low return flows.

(c) That the proper second foot allowance for the Northport Canal, based on 13,000 acres, is 186, as shown on page 253 of the report.

XXV.

The United States objects to the figures "2.6" appearing in the last line of the discussion of the Northport Canal on page 233 of the report.

As grounds for this objection, the United States says that the figure "2.6" is an obvious error when checked back against the other data appearing on pages 231–233 of the report and should be "4.2".

Respectfully submitted,

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